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Supreme Court, U.S.
FILED

No. ——— 08-102 JUL 21 2008

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In The Supreme Court of the United States

HOMI N. AMIRMOKRI,

Petitioner,

v.

SPENCER ABRAHAM,
Secretary, Department of Energy,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Did the court of appeals commit reversible error when it found no abuse of discretion in the district court's denial of Petitioner's request for further discovery in order to respond to a premature summary judgment motion?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Homi N. Amirmokri certifies that he is not a corporation.

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JURISDICTION

The judgment of the court of appeals was entered on February 22, 2008. The court denied *en banc* review on April 22, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

> private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in

rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000e-2(a):

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(e):

> (e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religions. Notwithstanding any other provision of this title [42 USCS §§ 2000e et seq.], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational

> institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. § 2000e-3(a):

> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing

under this title [42 USCS §§ 2000e-2000e-17].

STATEMENT OF THE CASE

On, June 23, 2005, Petitioner, Homi Amirmokri, ("Petitioner", "Amirmokri") brought action against the Department of Energy ("Respondent") for discrimination and retaliation. Respondent moved for Summary Judgment which was granted on May 9, 2006. The district court Judge granted this motion on the basis that no tangible action was taken against Petitioner; no discovery at the Federal level would produce any evidence precluding Summary Judgment and that no reasonable jury could find that the employer's stated reasons for taking the actions it did against Amirmokri were false.

On February 22, 2008, the fourth circuit court of appeals handed down an unpublished opinion, finding as to Amirmokri's retaliation claim that he had failed, at a minimum, to show that the Respondent's actions were mere pretext for discrimination based on national origin. With regard to the discrimination claim, the circuit court of appeals found a lack of any evidence which may show discrimination.

As will be shown, the fourth circuit's opinion failed to fully consider the denial of Petitioner's request for additional discovery to determine whether similarly situated employees existed to demonstrate a claim of disparate treatment.

REASONS FOR GRANTING THE PETITION

I. The District Court Abused its Discretion by not Granting Petitioner Additional Discovery

Petitioner was denied an opportunity to prove that similarly situated employees were treated differently than himself. Evidence that similarly situated non-minority employees were treated differently is essential to Plaintiff's *prima facie* case of discrimination. See Seavy v. TVA, 339 F.3d 454, 463 (6th Cir. 2003). Following the discovery period at the administrative level, evidence surfaced that a similarly situated employee to Petitioner – one accused of behavioral problems – existed. App. at 46-50. Additionally, there was new evidence that there were other employees besides Petitioner who failed to comply with sign in requirements and disregarded radiation protection. Id. at 42. At the district court, a request for further discovery regarding the new evidence was denied. Id. at 28-30. Unable to even establish a *prima facie* element of his claim, summary judgment was then granted against Petitioner. Id. at 38-40.

Because the burden lies with the nonmoving party at summary judgment to produce evidence illustrating the existence of a factual dispute, it is well established summary judgment should be denied where the nonmoving party has not had an opportunity to discovery information essential to its case. See Webster v. Rumsfeld, 156 Fed. Appx. 571, 579-80 (4th Cir. 2005) (finding summary judgment was premature where the district court was alerted

to plaintiff's need for discovery on similarly situated employees); see also Anderson v. Liberty Lobby, 477 U.S. 242, 250 n.5 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (noting summary judgment is only appropriate where there has been 'adequate time for discovery"); Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc., 936 F.2d 889, 893 (6th Cir. 1991); Oksanen v. Page Memorial Hosp., 912 F.2d 73, 77-78 (4th Cir. 1990).

In this case there is more than sufficient evidence to indicate Petitioner had inadequate opportunity to discover information central to his case. Alisha Duncan, the labor relations specialist with the Office of Human Resources at D.O.E., dealing with this matter, App. at 51-52, admitted that Amirmokri's conduct was compared with individuals committing "that type of behavior." Id. at 46-50. When asked to provide examples of the individual conduct to which Amirmokri was compared against, she spoke of one similarly-situated employee, who openly spoke against management and belligerently against the program, and was removed. Id. However, there is no evidence that Amirmokri spoke against management, belligerently against the program, used foul language, or threatened to physically attack anybody, meaning if anything his punishment *should* have been lighter than this as yet unknown similarly-situated person. Only further discovery

will allow Petitioner to learn the name of this person.[1]

Appellant should have been entitled to discover information surrounding similarly situated employees and their prior record of discipline, which may have included other incidents similar to Amirmokri's behavior. Only by investigating into these employees' prior disciplinary records could Petitioner establish the disparate treatment element of his *prima facie* case. It was necessary for Petitioner to take the depositions of two or three co-workers who were under Magwood, Petitioner's supervisor, for a significant length of time who could testify to the limited issue of various personalities of employees who had personality conflicts with others and yet weren't disciplined in any way. App. at 43-45.

The district court and the court of appeals found that the Plaintiff was not entitled to discovery because the "claims were thoroughly investigated at the administrative level and the central participants were deposed." App. at 15-16. However, this reasoning fails to recognize that the actual "claims investigated" did not include the disparate

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[1] In explaining the reasons for denying the Rule 56(f) affidavit, the Court reasoned primarily that the Petitioner was not subject to adverse employment action and as a result, could not establish a case of retaliation or discrimination. These reasons are problematic. The Rule 56 Affidavit, should have been considered as it explained the reason as to the inadequate discovery at the administrative stage, namely, that new information was provided at the administrative hearing, to upon which Petitioner had no opportunity to obtain discovery at the administrative stage of the case. App. at 43-45.

treatment of other similarly situated employees who did not file discrimination claims. Rather, the investigation narrowly addressed the Plaintiff's actions; namely, whether he committed the alleged offenses. Thus, if the standard is that no reasonable jury could find that the Defendant's actions were a pretext for discrimination or retaliation, based only on the investigation at the administrative level; the jury would lack information regarding a fundamental component of Plaintiff's case, i.e., the disparate treatment of similarly situated employees. Being afforded no discovery on this issue, the Plaintiff was entitled to discovery at the district court level and summary judgment was premature.

II. The District Court Applied an Incorrect Standard Regarding Petitioner's Retaliation

This Court recently rejected the approach taken by the court's below as to the standard of adverse actions that must be taken against an employee to constitute retaliation. Burlington Northern & Santa Fe Ry Co. v. White, 548 U.S. 53 (2006). In Burlington, this Court discussed the language of the anti-retaliation provision, which differs from the discrimination portion of the statute in that the substantive provision differs from that of the anti-retaliation provision in important ways. Id. at 62. With respect to the anti–discrimination portion of the opinion, this Court cited:

> "It shall be an unlawful employment practice for an employer –

> (1) *to fail or refuse to hire or to discharge* any individual, or otherwise to discriminate against any individual *with respect to his compensation, terms, conditions, or privileges of employment,* because of such individual's race, color, religion, sex, or national origin . . ." (emphasis added). Id.

However, with respect to the Anti-Retaliation portion of the statute, that language stated:

> Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:
>
> "It shall be an unlawful employment practice for an employer *to discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a) (emphasis added). Id. at 62.

This Court reasoned that since there was a limitation on "discriminate against" regarding the words "*with respect to his compensation, terms, conditions, or privileges of employment,*" that such limitation does not exist regarding retaliation cases

because these words are entirely missing from the retaliation provision. Id. at 62. As such, the Court adopted and instituted a uniform standard for retaliation cases consisting of anything that would dissuade a reasonable employee from participating in protecting his rights or the rights of others from discrimination: a markedly lower standard. Id. at 68.

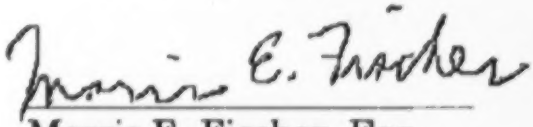
Burlington is similar to the case at bar because in Burlington, the Plaintiff was reassigned. In Burlington, this Court rejected the employer's argument that mere reassignment didn't lower the traditional factors affecting the tangible nature of the employee's position, such as a change in pay, significant reduction in duties, etc. This Court instead reasoned that there are different responsibilities within a given position and that some are more desirable than others. Id. at 70. This Court held that such change to an emphasis on less desirable duties with the same position was enough to constitute something that would dissuade an employee from participating in the Title VII process. Id. at 71.

Consequently, in the case at bar, the reassignment has been directly ruled upon by the Supreme Court in Burlington. For that issue, there is no question that the case should continue on that basis and that the district court's grant of summary judgment should be reversed.

CONCLUSION

For the reasons stated above, the district court's opinion should be reversed in its entirety.

Respectfully Submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1690

[Entered: February 22, 2008]

HOMI N. AMIRMOKRI,
Plaintiff - Appellant,

versus

SPENCER ABRAHAM, Secretary, Department of Energy,
Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (8:05-cv-01717-AW)

Argued: December 4, 2007
Decided: February 22, 2008

Before TRAXLER, Circuit Judge, HAMILTON, Senior Circuit Judge, and John Preston BAILEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Morris Eli Fischer, Bethesda, Maryland, for Appellant. Tarra R. DeShields-Minnis, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for

Appellee. **ON BRIEF:** Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Homi N. Amirmokri, an Iranian national, appeals the district court's order granting summary judgment in favor of the United States Department of Energy (the "DOE") on his employment discrimination and retaliation claims filed under Title VII of the Civil Rights Act of 1964. See 42 U.S.C.A. § 2000e to 2000e-17 (West 2003 & Supp. 2007). We affirm.

I.

Amirmokri was hired by the DOE in 1991, by Owen Lowe, the Associate Director in the Office of Nuclear Energy Science and Technology, a division of the DOE responsible for the management of nuclear facilities in the United States. At the time of the events in question, Amirmokri was a GS-15, Nuclear Engineer, and Lowe was his supervisor. Both men were based in the Washington, D.C. area.

Between 2001 and June of 2003, Amirmokri's assigned duties included serving as Program Manager for the Oak Ridge National Laboratory ("ORNL"), a nuclear energy facility in Oak Ridge, Tennessee. In this capacity, he visited ORNL every six to eight weeks, or as needed, and interacted with

DOE employees as well as employees of DOE's contractor, UT-Battelle, who worked on site.

The events in question arose out of several complaints made by employees at ORNL about Amirmokri's unprofessional behavior during Amirmokri's May 2003 visit to ORNL. The first complaint originated from Cathy Simmons, a UT-Battelle employee. As part of his duties, Amirmokri was responsible for reviewing transportation plans, including the Transportation Safety Document ("TSD") prepared by UT-Battelle for a Q-Ball cask that was to serve as a casing for nuclear material during transport within the ORNL facility. During the facility tour, Amirmokri raised concerns about the transportation plans to Raymond Bond, the facility manager at ORNL who was accompanying him. Bond advised Amirmokri that Simmons had drafted the TSD report and took Amirmokri to meet her. According to Bond, Amirmokri relayed his concerns about the TSD to Simmons and began to aggressively question Simmons about her work product. Simmons attempted to answer the questions, but did not do so to Amirmokri's satisfaction. The meeting "started to get out of control" with Amirmokri becoming frustrated with Simmons and cutting her off. J.A. 58. According to Bond, Simmons "was starting to visibly get shaken," prompting Bond to end the meeting. J.A. 59. Bond asked Amirmokri to prepare his questions and they would arrange another meeting to address them. Bond testified that Amirmokri's behavior was inappropriate, that he was "talking down" to Simmons, and that he handled himself in an unprofessional manner. J.A. 60. Simmons testified

that she was "flabbergasted by [Amirmokri's] tone and [his] line of reasoning." J.A. 54. She also testified that Bond apologized to her later that day for bringing Amirmokri to her unannounced, as well as for Amirmokri's "condescending attitude." J.A. 54. The incident was reported to Simmons's supervisor, Steve Marschman, and Simmons was asked to document the encounter.

The second complaint involved Gary Kelly, who served as a lead health physicist for the facility. During Amirmokri's tour of Kelly's area, Amirmokri was accompanied by Michael Woods, an ORNL facility representative. In order to gain access to a restricted area, Amirmokri (like all visitors) was required to provide Kelly with his name and position in order to obtain a dosimeter for possible radiation exposure. Kelly testified that he did not recognize Amirmokri and, when he asked him who he worked for, Amirmokri questioned Kelly as to why that mattered. When Kelly explained that he was required to record the information in order to report the dose to Amirmokri's employer, even if it was zero, Amirmokri told Kelly that it "did not matter [because the] dose would be reported to him." J.A. 385. Kelly reiterated that the dose had to be reported to Amirmokri's employer; if Amirmokri was self-employed, Kelly could record that, but Kelly could not issue the dosimeter without the required information. At some point, Woods interrupted the exchange by providing Kelly the requisite information for Amirmokri. Kelly issued the dosimeter, but called his supervisor and reported that he thought Amirmokri's conduct "was unprofessional" and that "if [i]t hadn't been for Mike

Woods, [he] would not have issued the [dosimeter]." J.A. 387. Woods's account of the dispute confirmed that Kelly required Amirmokri to fill out the requisite form for a dosimeter because Amirmokri, a program manager, was not on the ORNL list. Woods also confirmed that Kelly is required to record the names and employers of "people who come from off site to get dosimeters . . . so that they can send any dose records to that person." J.A. 116. Although Woods testified that he would not "characterize [Amirmokri's behavior] as rude," he appeared to acknowledge some dispute surrounding the incident. J.A. 117. According to Woods, "Kelly had asked [Amirmokri] what his name was as if he didn't know who he was. I think that kind of surprised [Amirmokri]. And then he asked him who did he work for, as if he didn't know who [Amirmokri] was, which he did because [Amirmokri's] been down . . . to see Gary Kelly several times in the past." J.A. 117. As noted above, Kelly stated that he did not recognize Amirmokri.

On May 8, 2003, Lowe received a telephone call from an Oak Ridge manager advising him of Simmons's and Kelly's complaints about Amirmokri's unprofessional behavior. Lowe, in turn, immediately contacted Amirmokri and cautioned him to "be on his best behavior" while at ORNL. J.A. 76.

Despite this warning, a third incident involving Amirmokri occurred approximately a week later when Amirmokri met with Larry Boyd, a GS-14 General Engineer with local oversight for the Oak Ridge facility, to discuss an e-mail Boyd had sent to

Amirmokri two months earlier. In the e-mail, Boyd acknowledged that the decision was ultimately Amirmokri's to make, but he presented Amirmokri with several technical points for why he thought the TSD for the Q-Ball cask was sufficient to ensure safety. In the course of doing so, Boyd related that he felt additional assessment would be "a waste of taxpayers' money." J.A. 65 (internal quotation marks omitted). Apparently, Amirmokri took great offense to Boyd's differing opinion as to the adequacy of the TSD. According to Boyd, Amirmokri "came into my office and shut the door[,] . . . sat down in a chair across from my desk and said, are you aware you can be sued for libel." J.A. 66. Boyd was taken aback by the comment, and he immediately contemplated (and asked Amirmokri) whether he needed to talk to a DOE lawyer before discussing the matter any further. Amirmokri referenced the libel threat at least two more times, but told Boyd that he (Amirmokri) had not yet contacted an attorney. According to Boyd, "the whole conversation was extremely disturbing . . . from a professional standpoint. It was not at all something that [he] was prepared to discuss. It took [him] totally by surprise." J.A. 67.

Disturbed by the encounter, Boyd reported the threat to his supervisor, who advised him to document the incident and, if he decided to pursue a more formal complaint, to do so quickly. Boyd also contacted a DOE lawyer, who reassured Boyd that they would represent him should anything materialize. Because Boyd felt that Amirmokri was trying to intimidate him, Boyd decided to report the matter to Lowe but to "cut [Amirmokri] the slack

and not pursue anything more formal than talking to Mr. Lowe about what had happened and letting him know that I really didn't appreciate it and that I would not put up with any such actions in the future." J.A. 179.

Because the incident with Boyd involved "the subject of qualifying the Q-ball, the same subject as with Cathy Simmons[,]" and occurred "a week after [he] had admonished [Amirmokri] to be on his best behavior," Lowe felt that further investigation was necessary. J.A. 76. Lowe additionally found the nature of the complaints "to be disturbing and, if true, very damaging to [Lowe's] ability to carry out [his] responsibilities for nuclear safety at [ORNL]." J.A. 76. Lowe decided that he should go to Oak Ridge and talk directly to the people who had raised the allegations and, after consultation with and approval from his superior, William Magwood, Lowe traveled to ORNL to personally investigate the complaints.

Upon his arrival at ORNL, Lowe interviewed Simmons, her supervisor Marschman, Bond, Bond's supervisor Carol Scott, and Kelly. Lowe then returned to headquarters and met with Amirmokri. However, Amirmokri "did not take the opportunity to rebut any of these issues that had been raised, other than saying that none of it had happened," which Lowe did not find to be credible. J.A. 78.

Lowe initially determined that Amirmokri should be reassigned away from his program manager duties at ORNL and to a "more headquarters-oriented" position. J.A. 79. Because Lowe had "no direct line authority over the people

that operate[d] the [ORNL] reactor and the nuclear facilities at Oak Ridge," Lowe was dependent upon having "good, solid collegial working relationships with the people at the site." J.A. 92. As he later advised Amirmokri, Lowe felt that "[t]he combined effect of the[] incidents ha[d] discredited [his agency] and disqualified [Amirmokri] as a representative of the Office to both the [DOE] and UT-Battelle organizations at Oak Ridge." J.A. 38.

On June 16, 2003, Lowe advised Amirmokri in writing of his reassignment. Amirmokri was advised to concentrate on the Documented Safety Analysis ("DSA") Review for the High Flux Isotope Reactor ("HFIR") at Oak Ridge, which was already a part of his duties and expected to take a large amount of time, and notified of the specific reasons for the reassignment as follows:

> Based on my personal observations since last July, I have concluded that you are no longer an effective representative of NE to the Oak Ridge DOE and contractor organizations. I have similar concerns about your interactions with headquarters personnel. I have also concluded that some of your interactions with ORNL and [other] personnel during your recent trip to Oak Ridge were totally unacceptable and have sufficiently damaged NE's effectiveness at the site that I must make a change.

> You have stated several times since I became your supervisor in July 2002 that you have too heavy a workload. I am also making this assignment in response to your stated concern. This assignment will enable you to achieve a timely and thorough completion of the DSA review.

J.A. 36. Amirmokri was also directed to participate in mandatory counseling through the Employee Assistance Program, and he was advised that disciplinary action as a result of the Oak Ridge incidents was under consideration.

DOE's human resources department reviewed Lowe's investigation and recommended a suspension of Amirmokri for two to five days, but Lowe disagreed. He felt that the matter could be handled with a simple letter of reprimand. Magwood testified that he too believed Amirmokri's conduct at ORNL warranted suspension, but he supported Lowe's decision (as the more immediate supervisor) to impose a lesser sanction. On June 27, 2003, Amirmokri received a written, but limited, reprimand for "inappropriate behavior while on official Government business at Oak Ridge between May 5, 2003 and May 16, 2003." J.A. 38. The reprimand referenced Amirmokri's "inappropriate and unprofessional behavior" on "three separate occasions," as reported to Lowe by the Oak Ridge personnel; specifically, Amirmokri's "rude and condescending" demeanor towards Simmons, his disregard of the requirements for access to a restricted radiation area, and his "line of questioning

and aggressive behavior" towards Boyd on May 15, 2003, the latter of which "occurred after [Lowe] had admonished [Amirmokri] on May 8, 2003, via telephone, to avoid such conduct." J.A. 38. Amirmokri was again "admonished to avoid similar behavior in the future and to conduct [himself] during future DOE business interactions in only the most disciplined, polite, and professional manner." J.A. 38. The reprimand itself was to remain in Amirmokri's personnel file for only one year, at which time it would be removed. Amirmokri's salary and grade level remained unchanged.

In the fall of 2004, Amirmokri initiated an EEOC complaint against the DOE, alleging that he had been discriminated against based upon his Iranian national origin and retaliated against for having pursued a prior national origin discrimination and retaliation action against the DOE.[1] Following discovery and an evidentiary hearing, an administrative law judge ruled that, even assuming that Amirmokri had established a prima facie case of national origin discrimination and retaliation, the DOE had "articulated legitimate reasons for its actions," which he found were "not a pretext for either national origin discrimination or

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[1] In the prior proceedings, Amirmokri alleged that the DOE failed to promote and train him because of his national origin, and delayed his promotion in retaliation for his having filed the EEOC complaint. A jury rejected Amirmokri's claim, and we affirmed that judgment on appeal. See Amirmokri v. Abraham, 119 Fed. Appx. 520 (4th Cir. 2005) (per curiam). Amirmokri's second EEOC complaint -- which led to this lawsuit -- was initiated after the district court entered judgment against him on the former complaint and while the appeal from that decision was pending before us.

retaliation." J.A. 29.[2] Amirmokri then filed this action, alleging that the reprimand and reassignment (to which he added an allegation of unattainable deadlines, at first, and then the deprivation of meaningful work assignments in his new duties) were adverse employment actions motivated by such discrimination and retaliation.[3]

II.

In order to prevail on a Title VII retaliation claim, a plaintiff is required to show: (1) that he engaged in protected activity; (2) that adverse employment action was taken against him; and (3) that a causal connection existed between the first two elements. See Holland v. Washington Homes,

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[2] The ALJ also noted, as we do, that "[t]he real theme that runs through the Report of Investigation is that [Amirmokri] believed that actions were taken against him because of his refusal to violate [a safety regulation]." J.A. 30. However, as aptly noted by the ALJ, even if true, "[t]his belief is not founded upon national origin discrimination or retaliation." J.A. 30.

[3] Amirmokri's complaint of unreasonable deadlines appears to involve his assigned responsibility to complete review of the DSA for the reactor at Oak Ridge. According to Lowe, the preparation of the DSA review was a "heavy" responsibility. J.A. 81. Amirmokri claimed that he was not only the best person to do the job, but possibly the only person to complete this assignment, which involved leading a team of 20-25 subject matter experts. It is undisputed that Amirmokri worked overtime to meet the deadline for the project, although Lowe testified that it was not excessive or unusual; it is also undisputed that Lowe extended the deadline six months after Amirmokri complained and that Amirmokri made no further requests for an extension of the deadline. Lowe disputes that Amirmokri was thereafter deprived of meaningful work assignments.

Inc., 487 F.3d 208, 218 (4th Cir. 2007). Assuming that a prima facie case is established, the burden then shifts to the employer "to rebut the presumption of retaliation by articulating a legitimate nonretaliatory reason for its actions." Id. (internal quotation marks omitted). The burden then shifts back to plaintiff "to show that the reason is mere pretext for retaliation by proving both that the reason was false, and that discrimination was the real reason for the challenged conduct." Id. (internal quotation marks omitted).

In order to prevail on an employment discrimination claim based upon national origin, plaintiff must show: (1) that he is a member of a protected class; (2) that he suffered an adverse employment action; (3) that he was performing his job duties at a level that met his employer's legitimate expectations at the time of the adverse employment action; and (4) that the position remained open or was filled by a similarly qualified person outside the protected class. See Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (en banc). As in the retaliation context, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. If the employer satisfies this requirement, the burden returns to the plaintiff to demonstrate that the reason is a pretext for discrimination based upon his national origin. See id.

In the instant case, it is undisputed that Lowe, who hired Amirmokri and had absolutely no involvement with or in the previous EEOC action or

ensuing lawsuit, received two unsolicited telephone calls from ORNL personnel complaining of unrelated incidents of inappropriate behavior on the part of Amirmokri towards DOE and UT13 Battelle employees working on site. After opting to give Amirmokri a mild verbal admonishment to be on his best behavior after the first complaint, Lowe received another complaint that Amirmokri had threatened an employee with a libel suit because the employee had expressed disagreement with Amirmokri's technical opinion as to the TSD requirements for the Q-Ball cast transport. Lowe traveled to ORNL to personally interview each of the offended parties and, at the conclusion of the investigation, gave Amirmokri an opportunity to respond, but was met with only a general denial, which Lowe found to be not credible. Lowe also determined that the combined effects of the complaints had discredited their agency and compromised Amirmokri's ability to effectively work with the ORNL facility personnel and contractors in the future.

Even if we assume that the actions taken against Amirmokri in the wake of his visit to ORNL qualify as "adverse employment actions" and that Amirmokri has met the other requirements of the prima facie case for his respective claims, Amirmokri cannot prevail on either of his claims because he has failed to demonstrate that Lowe's decision to reprimand him and reassign him away from his duties as project manager for ORNL was a mere pretext for discrimination based on his national origin or retaliation for his having previously filed suit for such claims.

With regard to the discrimination claim, there is absolutely no evidence that any complaint or employment action was taken based upon Amirmokri's national origin and nothing that would demonstrate that the reasons given for the employment actions taken in the wake of the unsolicited complaints were a pretext for such discrimination.

With regard to the retaliation claim, it is undisputed here that Lowe was only vaguely aware of the prior lawsuit at the time he investigated the ORNL complaints and was not involved with the previous litigation nor aware of any specific details of it. Even if he had been, there is no evidence that anyone at the DOE instigated the complaints from ORNL, the complaints largely originated from employees of UT-Battelle who were working at the site, and there is no evidence that Simmons, Bond, Kelly, or Boyd were ever aware of Amirmokri's prior litigation.

For the same reasons, we are unpersuaded that pretext may be shown from the fact that William Magwood's deposition testimony in the previous lawsuit was taken approximately two months before the ORNL complaints were received. Magwood was Lowe's supervisor at the time of the ORNL visit and approved Lowe's decision to visit ORNL to investigate the complaints made by the employees at that facility. However, there is no evidence that Magwood played any role in the complaints that were lodged against Amirmokri and he played no role in their investigation other than to authorize Lowe to look into the matter. At best,

Magwood merely supported Lowe's decision to impose a limited written reprimand -- a lesser sanction than that recommended by the human resources department and that he personally felt was warranted -- and to reassign Amirmokri to other duties due to his diminished effectiveness as a representative to the facility.

Equally unavailing are Amirmokri's assertions that summary judgment was premature because there are factual issues regarding whether he was unprofessional and because pretext may be proven by the fact that Lowe did not interview Woods during his investigation. With regard to the former, it is largely irrelevant whether Amirmokri was, in fact, unprofessional or whether Lowe should have believed his general denial over the specific complaints of the three ORNL employees. The ORNL personnel made these complaints, placing Lowe in the position of having to deal with them. The only relevant question is whether Lowe's decisions were motivated by the desire to discriminate or retaliate, and there is nothing in the record that would support an inference that Lowe disbelieved the accounts of the three ORNL employees, yet used them as pretext for such a hidden motivation. With regard to the latter, it is uncontroverted that Woods was not present during Amirmokri's encounters with Simmons or Boyd. While Woods was present during Amimokri's interaction with Kelly, Kelly initiated that complaint when he reported Amirmokri's behavior to his own supervisor. Kelly was personally interviewed by Lowe and confirmed in his testimony that he regarded Amirmokri's behavior to be unprofessional and offensive. At best, a minor

discrepancy exists as to whether Lowe attempted to interview Woods and why that interview did not take place, but Woods has never denied that there was an "incident" between Kelly and Amirmokri. He simply offered his view that Kelly knew or should have known Amirmokri and should not have imposed the normal requirements for entrance to a restricted access area. In short, Woods was not such a critical witness that Lowe's failure to interview him could support a finding of pretext.

Finally, we find no abuse of discretion in the district court's denial of Amirmokri's request to conduct further discovery under Rule 56(f), which provides the district court with discretionary authority, in appropriate cases, to deny a premature motion for summary judgment where the nonmoving party demonstrates that he has not had adequate time for discovery or needs additional time to complete it. See Fed. R. Civ. P. 56(f). As noted by the district court, Amirmokri's "claims were thoroughly investigated at the administrative level," and "the central participants" were all deposed. J.A. 413. In addition, the ALJ conducted an evidentiary hearing where the pertinent witnesses were questioned. Because Amirmokri failed to demonstrate that additional discovery would aid in rebutting the DOE's legitimate reason for reassigning Amirmokri away from his on-site duties at ORNL as project manager and imposing a minor reprimand for the conduct that necessitated that reassignment, we find that the district court did not abuse its discretion in denying Amirmokri's request for discovery.

To conclude, there is no indication that the DOE acted with a discriminatory or retaliatory motivation and, on the contrary, the evidence indicates that a reasonable determination was made that the complaints about Amirmokri had irretrievably compromised Amirmokri's ability to be effective as a DOE representative at the ORNL. The DOE has set forth legitimate, nondiscriminatory reasons for the alleged adverse employment actions taken against Amirmokri, and Amirmokri has failed to produce evidence upon which a reasonable jury could find the proffered reasons were a pretext for discrimination or retaliation. Accordingly, the district court did not err in granting summary judgment dismissing his retaliation and discrimination claims.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

[Entered: May 9, 2006]

HOMI AMIRMOKRI,

Plaintiff,

v. Civil Action No. AW-05-1717

SPENCER ABRAHAM,
SECRETARY, DEPARTMENT OF ENERGY

Defendant.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this 9th day of May, 2006, by the United States District Court for the District of Maryland, hereby **ORDERED:**

1. That Plaintiff's Motion for Leave to File a Surreply [19] BE, and the same hereby IS, **GRANTED**;

2. That Defendant's Motion for Summary Judgment [9] BE, and the same hereby IS, **GRANTED**;

3. That the Clerk of the Court **CLOSE** this case; AND

4. That the Clerk of the Court transmit copies of this Memorandum and Order to all counsel and parties of record.

/s/
Alexander Williams, Jr.
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

[Entered: May 9, 2006]

HOMI AMIRMOKRI,

Plaintiff,

v. Civil Action No. AW-05-1717

SPENCER ABRAHAM,
SECRETARY, DEPARTMENT OF ENERGY

Defendant.

MEMORANDUM OPINION

This action involves a Title VII suit brought by Homi Amirmokri ("Amirmokri" or "Plaintiff") against Spencer Abraham in his capacity as Secretary of the United States Department of Energy (the "DOE" or "Defendant"). In his Complaint, Plaintiff alleges retaliation for engaging in a protected activity—namely, the filing and subsequent litigation of an EEO complaint—and discrimination on the basis of national origin—specifically, Iranian—in violation of the Title VII of the Civil Rights Act of 1964. Currently pending before the Court are Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment [9], and Plaintiff's Motion for Leave to File a Surreply [19]. The Court has reviewed the entire record, as well as the pleadings with respect to the instant

motions. No hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons stated below, the Court will grant Defendant's Motion for Summary Judgment.

I. FACTUAL & PROCEDURAL BACKGROUND

At all times relevant to this action, Plaintiff, an Iranian immigrant, was a GS-15 level nuclear engineer employed by the DOE.[1] As part of his responsibilities, Plaintiff acted as Program Manager for the Oak Ridge National Laboratory ("ORNL"), a nuclear facility located in Oak Ridge, Tennessee. In this capacity, Plaintiff was responsible for, *inter alia*, reviewing safety measures at ORNL. On May 5, 2003, Plaintiff, who is based in the Washington, DC area, visited ORNL in connection with the planned transport of a "Q-Ball cask," a 25-ton metal container used to move hazardous nuclear materials. Plaintiff was scheduled to view the cask and receive a tour of the facilities that housed it.

While visiting ORNL, Plaintiff raised concerns over the adequacy of a Transportation Safety Document ("TSD") that had been prepared by Cathy Simmons ("Simmons"), a member of the ORNL research and development staff, outlining the potential hazards of transporting the Q-Ball cask. Plaintiff was alarmed because the TSD was based on a dated safety analysis report and did not take into consideration more recent—and more stringent—DOE safety regulations. Plaintiff voiced his concerns

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[1] As far as this Court is aware, Plaintiff remains in that position today.

to Ray Bond ("Bond"), the facility manager at the ORNL radiochemical and engineering development center, who offered to arrange an impromptu meeting between Plaintiff and Simmons. Although the parties' accounts of this meeting differ, it is essentially undisputed that the encounter did not go well. Simmons, who had never previously prepared a formal TSD, was unable to satisfactorily answer Plaintiff's questions, and the meeting was eventually cut short by Bond, who suggested that Simmons be given an opportunity to prepare detailed answers to Plaintiff's queries. While Plaintiff contends that he was neither rude nor discourteous towards Simmons, Simmons was evidently shaken by this exchange, later complaining to her superiors that Plaintiff addressed her in a "hostile, condescending manner" that made her "feel about two inches tall." (Pl.'s Opp., Ex. 10 at 15.)

Several days after the May 5th meeting, Plaintiff's supervisor at DOE, Owen Lowe ("Lowe"), was contacted by George Malosh, a manager at ORNL, and advised of Plaintiff's allegedly unprofessional conduct towards Simmons. Lowe was also informed of an incident that had occurred prior to the meeting, in which Plaintiff allegedly refused, when seeking entry into a limited access area at the facility, to identify his employer. Plaintiff was granted entry when Michael Woods, an ORNL representative who had been accompanying Plaintiff on his tour, stated that Plaintiff worked for DOE. After being notified of these incidents, Lowe spoke to Plaintiff and advised him to be "on his best behavior" during the remainder of his visit to ORNL.

On May 15, 2003, Plaintiff met with Larry Boyd, a GS-14 general engineer at ORNL, in Boyd's office at the facility. The subject of the meeting was an email that Boyd had sent to Plaintiff approximately two months earlier, in which Boyd suggested that performing an independent transportation safety review of the Q-Ball cask would be a waste of taxpayer money. Boyd has testified that upon entering his office and shutting the door, Plaintiff immediately asked him whether he (Boyd) knew that he could be sued for libel, and then repeated this question several times during the course of the meeting. Boyd was taken aback by this question, which he viewed as a thinlyveiled threat designed to suppress a differing technical opinion. Following this exchange with Plaintiff, Boyd contacted Lowe to complain.

Lowe, who was particularly troubled that this incident occurred after he had specifically admonished Plaintiff to be on his best behavior, decided to conduct his own investigation into Plaintiff's conduct at ORNL. After receiving approval from his supervisor, William Magwood, Lowe traveled to ORNL and interviewed Simmons, Bond, and several other individuals. Lowe did not, however, interview Woods, who had accompanied Plaintiff on part of his tour and later testified that he had not observed Plaintiff's behavior to be rude or unprofessional in any way. Lowe also spoke to Plaintiff regarding his conduct during the trip. According to Lowe, Plaintiff essentially denied that anything improper had happened, a response which Lowe did not find credible. Lowe then discussed the situation with the human resources department,

which advised him that a suspension of Plaintiff would, under the circumstances, be warranted. Lowe decided that a milder sanction would be sufficient, and issued Plaintiff a memorandum of reassignment and a letter of reprimand. The reassignment notice, issued on June 16, 2003, provided that Plaintiff would no longer have oversight duties at ORNL and that he was not to have any direct contact with anyone at the facility. The notice also instructed Plaintiff to focus his time and energy on completing a Documented Safety Analysis ("DSA") review. The letter of reprimand, issued on June 27, 2003, discussed Plaintiff's "inappropriate behavior" at ORNL, specifically referencing his meeting with Cathy Simmons, his meeting with Larry Boyd, and his conduct when seeking entry into the limited access area. The letter also provided that it would remain in Plaintiff's personnel folder for a period of one year and would then be removed.

After Plaintiff's reassignment, his primary task was to complete a DSA of the ORNL High Frequency Isotope Reactor ("HFIR") safety documentation. Plaintiff contends that in the course of completing the DSA, Lowe gave him "unattainable deadlines," forcing Plaintiff to work a substantial amount of overtime. Lowe asserts that although he expected Plaintiff to adhere to a certain schedule, Plaintiff was granted additional time to complete his assignment when it became clear that the original deadline would not be met. Plaintiff also alleges that after he completed the DSA, in September 2004, he was deprived of meaningful work until April 2005. Plaintiff asserts that approximately 70% of his time was spent reading technical journals, in an effort to

maintain his overall level of expertise, while the other 30% was dedicated to small, discrete tasks such as reviewing the DOE website. Defendant maintains that Plaintiff was given ample work and that his post-reassignment responsibilities were not significantly diminished, save for his loss of the ORNL Program Manager assignment.

In the fall of 2004, Plaintiff filed a formal complaint with the DOE, which was advanced the administrative hearing stage. Plaintiff claimed that his reassignment and letter of reprimand constituted discrimination on the basis of national origin and retaliation for the filing and litigation of an earlier EEO complaint.[2] On February 16, 2005, the administrative judge issued a bench ruling denying Plaintiff's claims, which was followed by a written order on March 11, 2005. On June 23, 2005, Plaintiff filed suit in this Court. Count I of the Complaint asserts a claim of retaliation, while Count II alleges discrimination on the basis of national origin. On November 30, 2005, Defendant filed the instant

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[2] In 2000, Plaintiff filed an EEO complaint against the DOE, asserting discriminatory failure to promote and other claims. In the fall of 2002, Plaintiff initiated a civil action on his EEO complaint in U.S. District Court for the District of Columbia. That case was subsequently transferred to District of Maryland and assigned to the undersigned judge. *Amirmokri v. Abraham*, Case No. AW-02-3446. On May 28, 2004, following a three-day jury trial, this Court entered judgment against Plaintiff. Plaintiff appealed to the Fourth Circuit Court of Appeals. Recently, by unpublished opinion, the Fourth Circuit affirmed this Court's judgment. *See Amirmokri v. Abraham*, Case No. 04-1835 (4th Cir. Jan. 14, 2005).

Motion to Dismiss or, in the Alternative, for Summary Judgment. That motion is ripe for disposition, and the Court now issues this opinion.

II. SUMMARY JUDGMENT STANDARD

When matters outside the pleadings are presented to the court, a Rule 12(b)(6) motion to dismiss shall be treated as a motion for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *Nat'l Mortgage Warehouse, LLC v. Trikeriotis*, 201 F.Supp.2d 499, 502 (D. Md. 2002). Where a party knows that materials outside the pleadings are before the court, that party is considered to have notice that the motion to dismiss may be treated as a motion for summary judgment. *Id.* Both parties in this case present affidavits and/or other outside pleadings for the Court's consideration. As such, the Court will treat Defendant's motion as a Motion for Summary Judgment.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 214 (4th Cir. 1993); *Etefia v. East Baltimore Comm. Corp.*, 2 F.Supp.2d 751, 756 (D. Md. 1998). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which

are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1). The court must "draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded to particular evidence." *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991) (internal citations omitted). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330-31 (4th Cir. 1998); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

III. PLAINTIFF'S REQUEST FOR DISCOVERY

Although Plaintiff does not object to the Court treating Defendant's instant motion as a Motion for Summary Judgment, Plaintiff argues that summary judgment is premature and inappropriate at this stage, as Plaintiff requires additional discovery in order to support his claims.

As a general rule, "summary judgment is appropriate only after adequate time for discovery." *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (citing *Celotex*, 477 U.S. at 322). A party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (internal citations omitted).

Under Rule 56(f), "summary judgment [may] be refused where the nonmoving party has not had the opportunity to discovery information that is essential to his opposition." *Nguyen v. Can Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (quoting *Anderson*, 477 U.S. at 250 n.5 (1986)). Rule 56(f) provides:

> **(f) When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). The Fourth Circuit has strictly interpreted the requirements of Rule 56(f), emphasizing the need for a Rule 56 affidavit that "particularly specifies legitimate needs for further discovery" and identifies "which aspects of discovery required more time to complete." *Nguyen*, 44 F.3d at 242. Indeed, the Fourth Circuit places "great weight on the Rule 56(f) affidavit" and, to that end, "[a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the

requirement of Rule 56(f) to set out reasons for the need for discovery in an affidavit." *Evans*, 80 F.3d at 961 (quoting *Nguyen*, 44 F.3d at 242 (internal citations omitted)).

In this case, Plaintiff substantively responds to Defendant's Motion for Summary Judgment, and, in addition, attaches to his opposition brief a Rule 56 affidavit by Plaintiff's attorney, asserting the need for additional discovery. Specifically, the Rule 56 affidavit states that Plaintiff needs discovery with respect to similarly situated employees who had been disciplined for misconduct similar to what Plaintiff is alleged to have engaged in. Plaintiff also seeks discovery "to compel the Defendant to provide clear and straight answers as to the reasons Amirmokri's safety concerns were not addressed," to determine "whether the Defendant violated a regulation as earlier testimony revealed," and to obtain additional information for David Knudsen, a "Personnel Management Consultant," regarding the precise nature of Plaintiff's present employment duties and responsibilities. In addition, in Plaintiff's surreply,[3] he alleges that new information has surfaced since the filing of his opposition brief involving a February 14, 2006 incident where similarly situated employees failed to comply with sign-in requirements at a restricted-access area. Plaintiff asserts that these employees were treated differently than he was and seeks further discovery regarding this alleged incident.

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[3] The Court will grant Plaintiff's unopposed Motion for Leave to File a Surreply.

Although Plaintiff has asserted the need to conduct additional discovery on a variety of different issues, the Court finds that Plaintiff has failed to demonstrate that the evidence he seeks to discover will materially affect the outcome of this case. A Rule 56(f) motion for additional discovery is properly denied when the additional evidence sought to be discovered would not create a genuine issue of material fact sufficient to defeat summary judgment. *Strag v. Board of Trustees, Craven Comm. Coll.*, 55 F.3d 943, 954 (4th Cir. 1995). In its motion for summary judgment, Defendant's central argument—which, for reasons set forth below, this Court finds persuasive—is that Plaintiff was not subjected to an adverse employment action and, as a result, cannot establish a *prima facie* case of either retaliation or discrimination. The law is clear that to prevail on either theory of recovery, Plaintiff must first establish that he suffered some adverse employment action. *See James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004) ("Regardless of the route a plaintiff follows in proving a Title VII action, the existence of some adverse employment action is required.") (internal citations omitted.) Therefore, because evidence concerning the treatment of similarly situated employees, or the violation of unspecified safety regulations, or the disregard of Plaintiff's safety concerns, has no bearing on the critical question of whether Plaintiff was subjected to an adverse employment action, Plaintiff's request to conduct further discovery with respect to those issues shall be denied.

The Court also denies Plaintiff's request for discovery on the information sought by his expert,

David Knudsen, who suggests that a "position audit" of Plaintiff's present employment circumstances—involving interviews with Plaintiff's supervisor and others with first hand-knowledge of Plaintiff's duties and responsibilities—will allow Mr. Knudsen to determine whether Plaintiff's grade level and future employability may have been jeopardized by his reassignment. Speculation about the future adverse consequences of a reassignment is insufficient to create a genuine dispute of material fact and fails to convert the supervisor's conduct into an adverse employment action. *See James*, 368 F.3d at 377.

Finally, the Court notes that Plaintiff's claims were thoroughly investigated at the administrative level, that the central participants in this matter have all been deposed, and that Plaintiff was granted an administrative hearing in which witnesses were produced and subjected to questioning. Yet, Plaintiff provides no reason as to why this investigative material does not provide a sufficient basis for his response to Defendant's Motion for Summary Judgment. In *Ladson v. Thompson*, the plaintiff filed a Title VII claim against her employer, claiming discrimination on the basis of race. 2003 WL 22889793, *1 (D. Md. December 3, 2003). The plaintiff filed a complaint with the EEOC, and after the EEOC denied her claims, the plaintiff brought her case to the federal district courts. *Id.* In response to the defendant's motion for summary judgment, the plaintiff argued in her opposition memorandum[4] that she had not

[4] The plaintiff in *Ladson* failed to file a Rule 56(f) affidavit, and rather made her arguments concerning additional discovery in the text of her opposition memorandum. *Id.*

had an adequate opportunity for discovery, and needed additional discovery in order to respond to the defendant's motion. *Id.* at *3. In rejecting plaintiff's argument, the court found that, not only had the plaintiff failed to comply with the requirements of Rule 56(f), but additionally that "this case was investigated at the administrative level and a wealth of information is already available. Therefore, summary judgment for Defendant is proper at this time." *Id.*

Here, although Plaintiff properly filed a Rule 56 affidavit specifying his need for further discovery, Plaintiff has presented no reason as to why the discovery provided at the administrative level is insufficient to allow Plaintiff to respond to Defendant's Motion for Summary Judgment. Furthermore, as discussed above, Plaintiffs requests for discovery concern information that is largely irrelevant and unnecessary to the issues in this case. Consequently, Plaintiff's request for additional discovery is denied.

IV. ANALYSIS

A. Retaliation

When a plaintiff brings a case of retaliation based on circumstantial evidence, courts must apply the three-part proof scheme outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination, whereupon the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the action.

McDonnell Douglas, 411 U.S. at 802. The plaintiff may then rebut the employer's proffer by proving by a preponderance of the evidence that the employer's legitimate non-discriminatory reason is actually a pretext for discrimination. *Id.* at 804. A plaintiff can prove pretext by showing that the employer's explanation is "unworthy of credence," or by offering other forms of circumstantial evidence sufficiently probative of discrimination. *Id.*

In order to establish a *prima facie* case of retaliation, a plaintiff must prove that: (1) he engaged in protected activity; (2) his employer took adverse employment action against him; and (3) a causal connection existed between the protected activity and the adverse employment action. *Carter v. Bell*, 33 F.3d 450, 460 (4th Cir. 1994).

Defendant does not dispute that Plaintiff engaged in protected activity when he filed his earlier EEO complaint and litigated those claims in district court. Rather, Defendant argues that Plaintiff has failed to demonstrate that he was subjected to any adverse employment action. This Court agrees. The crux of Plaintiff's retaliation claim is that Defendant reduced Plaintiff's work responsibilities as punishment for Plaintiff having engaged in protected activity. However, removing Plaintiff from his Program Manager position does not constitute an adverse employment action, particularly given that Plaintiff's subsequent assignment—leading the HFIR document safety analysis review—entailed substantial responsibility and was commensurate with Plaintiff's GS-15 grade.

Inquiries into adverse employment actions have consistently focused on whether there has been discrimination in such ultimate decisions as hiring, granting leave, discharging, promoting, and compensation. *Boone v. Goldin*, 178 F.3d 253, 255-56 (4th Cir. 1999); *see Von Gunten v. Maryland*, 243 F.3d 858, 863 (4th Cir. 2001) (in order to establish *prima facie* case of retaliatory harassment, plaintiff must show defendant's actions "adversely affected the terms, conditions, or benefits of plaintiff's employment"). In *Boone*, the Fourth Circuit Court of Appeals explained that a reassignment does not constitute an adverse employment action where the reassignment causes no reduction in compensation, job title, level of responsibility, or opportunity for promotion. *Boone*, 178 F.3d at 255; *James*, 368 F.3d at 376. Here, Plaintiff's salary, benefits, and title were unchanged. Furthermore, although the reassignment led to the loss of Plaintiff's ORNL Program Manager duty, it did not decrease the quality of Plaintiff's work, as the safety analysis review that Plaintiff was subsequently tasked with was in line with the rest of his duties as a GS-15 nuclear engineer. In his affidavit, Plaintiff underscores just how important, complex, and challenging this project was, noting that it "involved leading a team of 20-25 subject matter experts," and that "due to my previous position and experience, I was not only the best person, but possibly the only person" capable of completing the assignment. (Pl.'s Opp., Ex. 14.) Therefore, the reassignment of Plaintiff's duties did not constitute a significant decrease in his *level* of responsibility, and was not an adverse employment action within the meaning of Title VII.

Plaintiff alleges several other adverse employment action, including the imposition of "unattainable deadlines" for the DSA review; a lack of meaningful work following the completion of the review; and the letter of reprimand he received following his reassignment. The Court is unpersuaded. First, as to Plaintiff's claim that he was subjected to unattainable deadlines in connection with the DSA review, he does not address, acknowledge, or refute Lowe's assertion that Plaintiff's request for additional time to complete the assignment was readily accommodated, nor the fact that the DSA review was, in the end, completed before the September 2004 deadline.

Second, although Plaintiff claims that he was deprived of meaningful work assignments from October 2004 through April 2005, Plaintiff retained his responsibility for developing DOE safety regulations, leading review teams, and staying abreast of developments in the nuclear safety field. Plaintiff has not shown that he was shunted into a "dead-end position," or that his duties were inconsistent with his GS-15 grade level. *Cf. Mackey v. Shalala*, 43 F. Supp. 2d 559, 569 (D. Md. 1999) (reassignment constituted adverse employment action where plaintiff's new supervisor not given any specifics as to what plaintiff's duties and responsibilities would be, but rather told "you've got this employee, find something for her to do"). That Plaintiff may have felt inadequately challenged by his work is not enough to sustain his retaliation claim. *See James*, 368 F.3d at 376 ("The mere fact that a new job assignment is less appealing to the

employee, however, does not constitute adverse employment action.").

Finally, Plaintiff's letter of reprimand, which was removed from his personnel folder after one year, did not, in and of itself, constitute an adverse employment action. *See Jeffers v. Thompson*, 264 F.Supp.2d 314, 330 (D. Md. 2003) (reprimand or poor performance review is not adverse employment action unless it works real harm to employment or is intermediate step to discharge); *Allen v. Rumsfeld*, 273 F. Supp. 2d 695, 706 (D. Md. 2003) (low performance evaluations, reprimands, and counseling and communication card entries were not adverse employment actions); *Newman v. Giant Food, Inc.*, 187 F. Supp. 2d 524, 528-29 (D. Md. 2002) (verbal warning and counseling letter did not constitute an adverse action); *Nye v. Roberts*, 159 F. Supp. 2d 207, 213-14 (D. Md. 2001) (holding that written reprimand did not constitute an adverse action because "reprimands do not automatically affect the terms and conditions of employment"). Here, Plaintiff has not shown that the letter of reprimand affected the terms and conditions of his employment, his opportunities for advancement, or any other aspect of his career; as such, the June 27, 2003 letter of reprimand does not constitute an adverse employment action.

Moreover, even if Plaintiff could show an adverse employment action, Plaintiff cannot show that Defendant's legitimate, non-discriminatory reason is pretext. Defendant has presented ample evidence that Plaintiff's reassignment from the ORNL Program Manager position and letter of

reprimand were not the result of retaliatory animus, but rather Plaintiff's own actions. It is undisputed that in a span of approximately ten days, Plaintiff's supervisor, Owen Lowe, received two separate telephone calls from individuals complaining about Plaintiff's inappropriate and unprofessional conduct, the second of these calls coming after Plaintiff had specifically been admonished to be on his best behavior. Lowe conducted an investigation of these allegations and determined that: (1) Plaintiff had offended and upset Cathy Simmons when he questioned her about the Q-Ball TSD; (2) Plaintiff had offended and upset Larry Boyd when he threatened him with a libel suit; (3) Plaintiff had behaved unprofessionally when he refused to tell Gary Kelly, the technician controlling entry into the ORNL limited access area, the identity of Plaintiff's employer. Lowe also testified that he lacked direct authority over ORNL personnel, that he relied upon the Program Manager to maintain collegial working relationships with the people at the site, and that Plaintiff's conduct compromised Lowe's ability to carry out his duties.

In response, Plaintiff relies heavily upon the fact that when Lowe conducted his investigation, he never interviewed Mike Woods, who had accompanied Plaintiff into the limited access area and later testified that, in his view, Plaintiff's conduct was neither rude nor unprofessional. Plaintiff argues that this omission constitutes evidence of pretext. The Court notes, however, that Lowe *did* interview Gary Kelly, the ORNL technician, who stated at his deposition that he considered Plaintiff's refusal to identify his employer

to be unprofessional, that he discussed the incident with his own supervisor, and that if Woods had not intervened, Kelly would not have let Plaintiff into the facility. Thus, Lowe had ample basis to cite this incident in his investigative report and letter of reprimand. Furthermore, even if Lowe had interviewed Woods, Woods would have been unable to provide any insight into two out of the three incidents that prompted Plaintiff's reassignment—specifically, his meetings with Simmons and Boyd—because Woods was not present for those exchanges. As such, the Court cannot find that Lowe's failure to interview Woods is evidence of pretext.

Plaintiff also argues that Defendant's articulated reasons for his reassignment and reprimand were pretextual because, in his meetings with Simmons and Boyd, Plaintiff was *right*—that is, Plaintiff had legitimate concerns regarding the transport of the Q-Ball cask and was merely doing his job in insisting that DOE safety regulations be followed. That he was punished for his diligence and conscientiousness, Plaintiff contends, demonstrates that Defendant's proffered reasons were merely pretextual. This argument has little merit, because whatever the basis for Plaintiff's disagreement with his colleagues, it was the *manner* in which he voiced his concerns, rather than the *nature* of his objections, that served as the grounds for his reassignment and reprimand. In other words, the soundness of Plaintiff's professional conclusions has little to do with whether those conclusions may have been delivered in a manner that was rude, inappropriate, and deserving of sanction. Furthermore, even if Plaintiff's supervisor

overreacted to the multiple complaints regarding his behavior, "this Court does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by [employers] charged with employment discrimination." *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998). In sum, Plaintiff has not produced sufficient evidence for a reasonable trier of fact to conclude that Defendant's actions had any relation to Plaintiff's prior EEO complaint, or that Defendant's legitimate, non-discriminatory reasons were merely pretextual. Accordingly, Defendant is entitled to summary judgment on Plaintiff's retaliation claim.

B. Discrimination

In addition to his claim of retaliation, Plaintiff also asserts that he was the victim of national-origin-based discrimination. In order to establish a *prima facie* case of employment discrimination, Plaintiff must show that: (1) he is a member of a protected class; (2) he had satisfactory job performance; (3) he was subjected to an adverse employment action; and (4) similarly situated employees outside his class received more favorable treatment. *See Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

"It is well-established in the Fourth Circuit and elsewhere that the same adverse-action standard applies to both [retaliation and discrimination] claims." *Peary v. Goss*, 365 F. Supp. 2d 713, 723 n.11 (E.D. Va. 2005); *see also James*, 368 F.3d at 375 n.2. Because this Court has already determined that Plaintiff was not subjected to an

adverse employment action, his discrimination claim fails as a matter of law.

V. CONCLUSION

For all of the reasons stated above, Defendant's Motion for Summary Judgment [9] is GRANTED. An Order consistent with this Opinion will follow.

May 9, 2006
Date

/s/
Alexander Williams, Jr.
United States District Judge

[Entered: April 22, 2008]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1690
(8:05-cv-01717)

HOMI N. AMIRMOKRI,

Plaintiff – Appellant

v.

SPENCER ABRAHAM, Secretary, Department of Energy,

Defendant – Appellee

ORDER

The petition for rehearing en banc was circulated to the full Court. No poll was requested. The Court denies the petition for rehearing en banc.

For the Court

/s/ Patricica S. Connor, Clerk

Homi Amirmokri attests hereto under the penalties of perjury.

I recently became aware of an incident occurring February 14, 2006, in which there was an occurrence at one of the Office of Nuclear Energy, Science and Technology Facilities at Oak Ridge. The issue had to do with three employees who disregarded radiation protection. Specifically, they disregarded the frisking requirement and failed to comply with sign-in requirements, which was one of the identical accusations charged against me. In the February 14, 2006 incident, an occurrence report was filed describing the event and possible consequences, in accordance with D.O.E. regulations (D.O.E. order 232.1-1A) and it is further required that this report be reviewed and approved by the Office of Nuclear Energy.

This was not done in my case. There was no occurrence report filing regarding the charge that I disregarded radiation protection procedures of any kind created, reviewed or approved by anyone from D.O.E.

/s/_____ [3/3/06]
Homi Amirmokri

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Homi N. Amirmokri,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO: AW-05-1717
Spenser Abraham,	)	
Secretary United States	)	
Department Energy,	)	
Agency,	)	
	)	

Morris E. Fischer, Esq. herein declares and states as follows:

I represent Plaintiff in this matter. Should this Court deny Defendant's Motion to Dismiss or in the alternative for Summary Judgment, counsel would seek discovery in the following ways of at least these following items.

1) Similarly situated employees with regard to any employee disciplined by the Defendant under Magwood, for conduct involving rude behavior, destruction of property, refusal to provide identification, mentioning of a lawsuit to another employee. All documents memorializing the investigations performed, whether key witnesses were left out of the investigation, the level of review

Magwood had regarding discipline issues made by other supervisors.

2) Compel the Defendant to provide clear and straight answers as to the reasons that Amirmokri's safety concerns were not addressed and/or related back to him.

3) Whether the Defendant acknowledges that it violated a regulation as earlier testimony revealed.

4) All information sought by Dr. Knudson in his report so he could provide a more definitive opinion regarding the constructive termination.

Depositions

The following people would be deposed:

1. William Magwood (to address a number of the issues as testified to by Alesha Duncan at the Administrative hearing)

2. Owen Lowe

3. several co-workers to determine whether there were other employees under Magwood who could have been disciplined for similar conduct Amirmokri was accused of doing but weren't.

I declare the foregoing is true and correct.

I also herein declare that to my knowledge all documents presented in this opposition were either documents previously presented in the administrative proceeding, presented by Dr. Knudson, and are genuine and authentic.

_____/s/_____
Morris E. Fischer, Esq.

they part of a written document or are they part of the DOE manual?

A No. The Douglas factors are widely accepted in the employee relations field. They come from case law. I believe it was Douglas versus Veteran Affairs. Douglas factors have been around for years, so —

JUDGE TEITELMAN: From the MSPB case.

THE WITNESS: Yes, sir.

BY MS. STRANGIS:

Q Okay, Getting back to similarly situated employees, have there been suspensions of employees at that grade level?

A There have been suspensions, and there have even been a few removals. That was not for the first offense for removals, but there were subsequent offenses and we have removed employees from the Department of Energy for that type of behavior.

Q And the suspensions were for similar offenses?

A Yes, ma'am.

JUDGE TEITELMAN: When you say for similar offenses, can you be more specific?

THE WITNESS: For inappropriate conduct.

JUDGE TEITELMAN: Such as?

THE WITNESS: It would be characterized as the same type of inappropriate behavior in public places.

JUDGE TEITELMAN: Don't you think there's different kinds of inappropriate conduct; some warrant a reprimand and some warrant a suspension and some warrant a removal?

THE WITNESS: (Non-verbal response)

JUDGE TEITELMAN: So, you're using this generalization, and I don't buy that. I like to know the specifics.

THE WITNESS: I'm sorry. The specific cases, is that what you want to speak to?

JUDGE TEITELMAN: Yeah. I mean, if she's asking you a question as to other people received — you know, have been treated the same, I'd like to know specifically what were they charged with. If they were charged with inappropriate conduct, what was the underlying offense?

THE WITNESS: Okay. I'll tell you about the specific cases. We've had a GS-14 scientist who was a premier engineer in the Office of Energy Efficiency go to several conferences, and while his management wanted to put forth one position, he spoke openly against his management. And this was — had something to do with some refrigeration and writing rules. This is what this person did. And so he would

talk about how the rules shouldn't be written this way and just completely belligerent in conferences and stuff like that. So, ultimately, he was removed.

JUDGE TEITELMAN: Okay. Now, that's not what the Complainant did, correct?

THE WITNESS: No, the Complainant —

JUDGE TEITELMAN: The Complainant was a GS-15 and not a GS-14.

THE WITNESS: Correct.

JUDGE TEITELMAN: Did the Complainant do anything like the behavior you just described?

THE WITNESS: The Complainant, as a representative of a program office, did act inappropriately before —

JUDGE TEITELMAN: But was his inappropriate conduct the same type of conduct that the individual did in the example you just provided?

THE WITNESS: In a generic sense, yes, because —

JUDGE TEITELMAN: Generic?

THE WITNESS: — as a representative of a program office, that person is held to a different standard than someone who may be a GS-11 or a GS-5 clerk or whatever. That person is the

representative of the program. They're held to a different standard.

JUDGE TEITELMAN: Okay. But he didn't speak belligerent — this Complainant here did not speak against the program, did he?

THE WITNESS: He didn't speak against the program, but his behavior towards the people that he was in contact with was inappropriate and was in fact a dispersion against the program office.

JUDGE TEITELMAN: Okay. And what was inappropriate about his behavior, if you recall?

THE WITNESS: The way he spoke to the people — what is — the female, the way he spoke to her. The way he spoke to I think it was Mr. Kelly at the site when he did not want to follow the procedures, did not want to provide information. And also, I think, with Mr. Boyd he also had an inappropriate exchange.

JUDGE TEITELMAN: and what kind of inappropriate exchange with. Mr. Boyd?

THE WITNESS: I don't recall specifics.

JUDGE TEITELMAN: Next question.

BY MS. STRANGIS:

Q Mr. Amirmokri also had a change to some of his duties. Were you aware of that?

A Yes, ma'am.

Q Did you have anything to do with that

Q Right.

A And Aleshia Duncan.

Q And to your knowledge, did Aleshia Duncan have professional experience in this area?

A Absolutely.

Q So you felt justified in relying upon what she said?

A Very — I have a lot of confidence in Aleshia's ability in this area.

Q So you took her recommendation?

A Yes.

Q This is what she recommended?

A Actually, no, she recommended more stern discipline. I —she advised me that his actions as we learned about them would qualify him for a suspension rather than a letter of reprimand, and I took the lesser course.

Q And did she agree with your decision to mitigate, as it was?

A Reluctantly.

Q Reluctantly?

Okay. So, having decided to do that, you issued it, and did you get a response from him?

A The letter of reprimand does recommend a path forward that he can take, including wœrking within the